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Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2004

BENON JOHN TRAWINSKI,
IRENE MONAHAN TRAWINSKI,
PETITIONERS,

V.

UNITED TECHNOLOGIES CARRIER CORPORATION;
COMFORT SYSTEMS, U.S.A. (OWNER AND
PARENT CORPORATION OF STANDARD HEATING
AND AIR CONDITIONING CO.),
RESPONDENTS.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

Did the Eleventh Circuit Court of Appeals depart exceedingly from the accepted and usual course of judicial proceedings and did this Court of Appeals sanction such departure by the lower Court?

LIST OF PARTIES IN THE PROCEEDING IN THE ELEVENTH CIRCUIT COURT

Comfort Systems, U.S.A. (hereinafter referred to as Comfort Systems); 777 Post Oak Boulevard, Houston, Texas 77056, owner and parent corporation for Standard Heating and Air Conditioning Co. (hereinafter referred to as Standard Co.).

Fox, Anthony N., Scott, Sullivan, Streetman & Fox, P.C., 2450 Valleydale Road, Birmingham, Alabama 35244; (205) 967-9675; attorney of record for Comfort Systems.

Sprain, Jr., Robert H., Sprain & Associates, P.C., 201 Beacon Parkway West, Suite 317, Birmingham, Alabama 35209; (205) 437-3232 attorney of record for United Technologies Carrier Corporation (hereinafter referred to as Carrier).

Trawinski, Benon John, pro se petitioner.

Trawinski, Irene Monahan, pro se petitioner.

United Technologies Carrier Corporation, One Carrier Place, Farmington, Connecticut 06034.

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OPINION BELOW

The United States [illegible]enth Circuit Court PER CURIAM of March 16, 2005 is repr[illegible]ed in the Appendix at pages 1-9. The PER CURIAM June 02, 2005 Order denying Petition for Rehearing en Banc is reproduced in the Appendix at page 10.

JURISDICTION

The judgment (App. 1-9) sought to be reviewed was entered March 16, 2005. The petition for a writ of certiorari is being filed within 90 days after denial of the Petition for Rehearing en banc (App. 10), pursuant to the United States Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND ALABAMA LAW PERTINENT TO THIS CASE

Constitutional Provision.

The Alabama Constitution states "[t]hat all courts shall be open; and that every person, for any injury done him, in his lands, goods, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." Article I, § 13, Constitution of the State of Alabama, 1901, Volume 1, Michie's Alabama Code 1975, The Michie Company, Charlottesville, Virginia 1993. See also *Lankford v. Sullivan, Long & Hagerty*, 416 So.2d 996, 999 (Ala. 1982).

Alabama Extended Manufacturer's Liability Doctrine (AEMLD):

The Products Liability Act § 6-5-500 et seq. was enacted "to provide a comprehensive time framework for the commencement and maintenance of all product liability actions brought in this state (Acts 1979, No. 79-468, p. 855, § 1)." It includes, among six products liability actions, those based upon "the Alabama extended manufacturer's liability doctrine, as it exists or is hereafter construed or modified." Civil Practice, Volume 5, Title

6, Michie's Alabama Code 1975, Article 28, § 6-5-501, p. 435. The principles of liability under AEMLD are the following.

> "To establish liability, a plaintiff must show:
> (1) he suffered injury or damages to himself or his property by one who sells a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold." *Civil Practice*, Article 28, p. 434.

ALA. CODE § 6-5-502(b).

> "Where the personal injury, including . . . property damage (I) either is latent or . . . not discoverable in the exercise of reasonable diligence at the time of its occurrence, and (ii) is the result of . . . exposure to some . . . harmful or injury producing . . . element . . . over a period of time . . . the product liability action claiming damages . . . must be commenced within one year from the date such personal injury or property damage is or in the exercise of reasonable diligence should have been discovered by the plaintiff or the plaintiff's decedent, and in such cases each of the elements of the product liability action shall be deemed to accrue at the time the personal injury is or in the exercise of reasonable diligence should have been discovered by the plaintiff or the plaintiff's decedent; . . ."

ALA. CODE § 6-5-502(c).

> "Notwithstanding the provisions of subsections (a) and (b) of this section, a product liability action against an original seller must be brought within 10 years after the manufactured product is first put to use by any person or business entity who did not acquire the manufactured product for either resale or other distribution or for

> incorporation as a component part in a manufactured product which is to be sold or otherwise distributed in its unused condition."

ALA, CODE § 6-2-38(l)

> "All actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years."

STATEMENT OF THE CASE

This diversity action was commenced on June 24, 2003 when petitioners, who are residents of the State of Alabama, filed a complaint in the United States District Court of the Northern District of Alabama, Southern Division, entered as CV-03-RRA-1528-S, against Respondents Carrier and Comfort Systems. Petitioners averred in their pleadings (R1-1 and 2) liability under Alabama Extended Manufacturer's Liability Doctrine (AEMLD) against Carrier and Comfort Systems. Complaint (R1-1) and Amendment to Complaint (R1-2) were served with summons October 20, 2003.

Carrier filed 11/10/04 Motion to Dismiss (R1-6), and 12/1/03 Motion for Sanctions under Rule 11 (R1-8). An 11/19/03 Order (R1-7) was issued for petitioners/plaintiffs to respond to Carrier's Motion to Dismiss by December 15, 2003. This was followed by the 12/3/03 Order (App. 32) setting oral argument on Carrier's motions for January 12, 2004. At the January 12, 2004 Hearing, the Magistrate Judge requested Carrier's attorney to write a proposed memorandum opinion (R1-14 at 23, lines 21-23), and instructed him to file it in the Court (R1-14 at 26, lines 1-2) - an instruction Carrier did not comply with. At the same time the Court instructed plaintiffs to respond to Carrier's proposed memorandum opinion (R1-14 at 24).

On January 20, 2004 Comfort Systems belatedly appeared by filing a motion to dismiss (with attachment of a Complaint

unrelated to plaintiffs' AEMLD action) (R1-13) to which there was no Court Order issued for plaintiffs to respond. Prior to this and as a result of Comfort Systems' nonappearance after being served with Summons, petitioners' 11/28/03 Request for Entry of Default (R1-9), re Comfort Systems' failure to appear, was filed pursuant to F.R.C.P. 55(a); it received no response from the Magistrate Judge.

A motion by Carrier to supplement the record was granted by an Order (App. 30 docketed on March 8, 2004; a motion by plaintiffs for leave to amend their pleadings was denied by an Order (App. 31) docketed on March 10, 2004.

Carrier's proposed memorandum opinion, served but not filed with the United States District Court, was not a communication to plaintiffs, but a proposal requested by and addressed to the Court. In accordance with a Court directive at the 1/12/04 Hearing (R1-14 at 24) petitioners filed on March 12, 2004 their response (R1-22) to Carrier's proposed memorandum opinion; because Carrier's proposed memorandum opinion was not filed with the Court, plaintiffs attached it to their response.

On May 21, 2004 the Magistrate Judge issued an Order (App. 27-28) stating that "consideration of the defendants' motion to dismiss is complete" and enclosing forms of consent for continuing jurisdiction by the Magistrate Judge.

On June 7, 2004 a Memorandum Opinion (App. 14-26) and an Order (App. 13) dismissing the Complaint with prejudice was issued by Senior District Court Judge Robert B. Propst.

Plaintiffs' Notice of Appeal filed July 7, 2004 was changed (in ink), at the United States District Court level, indicating a switch in jurisdiction (App. 11-12) back to the Magistrate Judge; this change became known to plaintiffs upon the District Court's sending to the Clerk of the United States Eleventh Circuit Court of Appeals a checklist for transmission of documents.

The Eleventh Circuit Court affirmed the District Court's grant of summary judgment on limitations grounds (App. 9). The Eleventh Circuit Court judgment, which petitioners seek to have reviewed, was entered March 16, 2005. Petition to the Eleventh Circuit Court for Rehearing en banc was denied June 2, 2005. (App. 10).

REASONS FOR GRANTING THE WRIT

Petitioners rely on Rule 10(a) of the United States Supreme Court, which indicates the character of the reasons the Court considers for granting review: "a United States Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's supervisory power; . . ."

I. THE DECISION BY THE COURT BELOW TO SANCTION DENIAL OF NOTICE OF CONVERSION TO SUMMARY JUDGMENT AND THE UNFAIR AND PREJUDICIAL CONDUCT OF THE HEARING BY THE MAGISTRATE JUDGE IN THE LOWER COURT FROM WHICH THE BASIS FOR THE DENIAL ORIGINATED ARE IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

At the 1/12/04 Hearing on Carrier's motion to dismiss and motion for sanctions in the United States District Court, defense attorney Sprain spoke rapidly in a frequently inaudible voice and was permitted by the Magistrate Judge to dominate the Hearing. The microphones were not turned on, and even the Court Reporter had difficulty in hearing, as evidenced by her rendering of *Lankford* as *Ford* (R1-14 at 3, line 22) and as *Long* (R1-14 at 13, line 21). Numerous other places in the transcript indicate lack of adequate hearing by participants. Moreover the Magistrate Judge's cutting one of the plaintiffs off several times during her arguments encouraged attorney Sprain's abuses during the Hearing.

At the Hearing (R1-14 at 15, line 12) Carrier's defense attorney Sprain intentionally prejudiced the case to destroy